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Ghazalee bin Kassim & Ors v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05–53–08 (J), 05–54–08 (J) AND 05–55–08 (J)
ZAKI AZMI CHIEF JUSTICE, HASHIM YUSOFF AND MOHD GHAZALI YUSOFF FCJJ
17 JUNE 2009

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Criminal Procedure — Trial — Defence — Trial judge took 4 1/2 years to call defence of accused to drug trafficking charge — Accused persons claimed delay prejudiced them because they could not recollect all facts nor locate all witnesses in support of their case — Whether facts of each case would determine whether delay had caused a miscarriage of justice — Whether trial judge was right to find prima facie case established after maximum evaluation of prosecution's case — Whether non-calling of witness did not warrant invocation of adverse inference against prosecution — Whether prosecution had proven common intention of accused to traffick in dangerous drugs under s 34 of the Penal Code — Evidence Act 1950 s 114(g)

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The appellants herein, whose conviction and sentence by the High Court for jointly trafficking in 50,659g of cannabis were upheld by the Court of Appeal ('COA'), raised four issues in their instant appeal against the COA's decision. The main ground was that the trial judge's delay of four years and five months in deciding to call their defence to the charge had caused a miscarriage of justice because they were unable to recollect all the facts and were also unable to locate witnesses who could support their case. The third appellant (Ghazalee bin Kassim) contended that the trial court should have invoked adverse inference against the prosecution under s 114(g) of the Evidence Act 1950 for not calling or offering to the defence a person known as 'Ah Meng' because if he had been called, Ah Meng would have supported the third appellant's defence that at the material time he was having a meeting with Ah Meng at a hotel to collect a RM25,000 gambling debt. The defendants contended that the prosecution had not proven that they had common intention to traffick in the cannabis and that because cannabis was also known as 'Indian hemp', possession of the drug could not amount to an offence.

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Held, dismissing the appeal and affirming the convictions and sentences:

(1) Delay per se could not be construed as a miscarriage of justice. It depended on the facts of each case. On the facts of the instant case, the trial judge's delay in calling for the defence had not caused any injustice. The Court of Appeal rightly found that the trial judge had thoroughly

evaluated the prosecution's case to conclude that a prima facie case had been made out against the accused (see paras 7 & 10–11).

(2) On the facts of the case, adverse inference under s 114(g) of the Evidence Act could not be invoked against the prosecution for not calling 'Ah Meng'. There was no evidence to show the prosecution had intentionally withheld producing 'Ah Meng' as a witness. In fact, the prosecution through PW4 testified that all its attempts to locate 'Ah Meng' had failed (see paras 18 & 20).

(3) The facts of the case proved beyond reasonable doubt that while the third appellant was at the hotel room to collect the payment for the sale of the cannabis, the first and second appellants were delivering the drugs. It was clear that the third appellant had pre-arranged and acted in concert with the other two appellants to traffick in the cannabis. The trial judge was right to conclude from the facts that the third appellant's unsworn statement that he was at the hotel to collect a gambling debt from Ah Meng was only possibly true and failed to raise a reasonable doubt on the prosecution's case and that all three appellants had acted with common intention to traffick in the drug (see paras 23–25).

(4) Cannabis was known by different names all over the world but its chemical constituent was the same. There was no basis to hold that just because cannabis was also called 'Indian Hemp', the drugs seized in the instant case did not fall within the definition of 'dangerous drugs' under the Dangerous Drugs Act 1952 (see para 26).

[Bahasa Malaysia summary

Perayu-perayu di sini, yang sabitan dan hukuman dijatuhkan oleh Mahkamah Tinggi kerana mengedar bersama kanabis seberat 50,659 gram disahkan oleh Mahkamah Rayuan ('MR'), membangkitkan empat isu dalam rayuan mereka ini terhadap keputusan MR. Alasan utama adalah bahawa kelewatan hakim perbicaraan selama empat tahun dan lima bulan dalam memutuskan untuk memanggil pembelaan mereka kepada tuduhan telah menyebabkan ketidakadilan kerana mereka tidak dapat mengingat kembali kesemua fakta dan juga tidak dapat mencari saksi-saksi yang dapat menyokong kes mereka. Perayu ketiga (Ghazalee bin Kassim) berhujah bahawa mahkamah perbicaraan sepatutnya membangkitkan inferens bertentangan terhadap pihak pendakwaan di bawah s 114(g) Akta Keterangan 1950 ('Akta') kerana tidak memanggil atau menawarkan kepada pembelaan seorang yang dikenali sebagai 'Ah Meng' kerana jika dia dipanggil, Ah Meng akan menyokong pembelaan perayu ketiga bahawa pada masa material dia sedang bermesyuarat dengan Ah Meng di hotel untuk mengutip hutang perjudian sebanyak RM25,000. Defendan-defendan berhujah bahawa pihak pendakwaan tidak membuktikan bahawa mereka mempunyai niat bersama untuk mengedar kanabis dan

A bahawa kanabis juga dikenali sebagai 'Indian hemp', milikan dadah tersebut tidak merupakan kesalahan.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

B (1) Kelewatan itu sendiri tidak dapat ditafsirkan sebagai ketidakadilan. Ia bergantung ke atas fakta setiap kes. Atas fakta kes ini, kelewatan hakim perbicaraan dalam memanggil pembelaan tidak menyebabkan apa-apa ketidakadilan. Mahkamah Rayuan dengan betul mendapati bahawa hakim perbicaraan telah menilai dengan teliti kes pihak pendakwaan C untuk memutuskan bahawa kes prima facie telah dibuat terhadap tertuduh (lihat perenggan 7 & 10–11).

(2) Atas fakta kes, inferens bertentangan di bawah s 114(g) Akta tidak dapat dibangkitkan terhadap pihak pendakwaan kerana tidak memanggil 'Ah D Meng'. Tidak terdapat keterangan untuk menunjukkan pihak pendakwaan telah dengan sengaja enggan mengemukakan 'Ah Meng' sebagai saksi. Sebenarnya, pihak pendakwaan melalui PW4 memberi keterangan bahawa kesemua percubaannya untuk mengesan 'Ah Meng' telah gagal (lihat perenggan 18 & 20).

E (3) Fakta kes membuktikan melampaui keraguan yang munasabah bahawa semasa perayu ketiga berada di bilik hotel untuk mengutip bayaran untuk jualan kanabis, perayu pertama dan kedua sedang menghantar dadah tersebut. Ia adalah jelas bahawa perayu ketiga telah mengatur terdahulu dan bertindak bersama kedua-dua perayu untuk mengedar F kanabis. Hakim perbicaraan adalah betul untuk memutuskan daripada fakta bahawa penyataan tidak diangkat sumpah perayu ketiga bahawa dia berada di hotel untuk mengutip hutang perjudian daripada Ah Meng hanya berkemungkinan benar dan gagal untuk membangkitkan G keraguan munasabah ke atas kes pihak pendakwaan dan bahawa ketiga-tiga perayu telah bertindak dengan niat bersama untuk mengedar dadah tersebut (lihat perenggan 23–25).

(4) Kanabis juga dikenali dengan nama-nama berbeza di seluruh dunia tetapi unsur kimianya adalah sama. Tidak terdapat asas untuk H memutuskan bahawa hanya kerana kanabis juga dipanggil 'Indian Hemp', dadah yang dirampas dalam kes ini tidak terangkum dalam definisi 'dangerous drugs' di bawah Akta Dadah Berbahaya 1952 (lihat perenggan 26).]

I **Notes**

For cases on adoption, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 3271–3286.

For cases on legitimacy, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 3483–3489.

Cases referred to

Amathevelli a/p P Ramasamy v PP [2009] 2 MLJ 367; [2009] 3 CLJ 109, FC (refd)
Mohamed Abdullah s/o Abdul Razak v PP [2000] 2 SLR 789, HC (refd)
Mohd Shamshir bin Md Rashid v PP [2008] 5 MLJ 80; [2008] 6 CLJ 738, CA (refd)
Munusamy Vengadasalam v PP [1987] 1 CLJ 250; [1987] CLJ Rep 221, SC (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465; [1998] 1 CLJ 793, FC (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37; [2005] 1 CLJ 466, CA (refd)
Tan Hun Wah v PP and another appeal [1994] 1 MLJ 382; [1994] 2 CLJ 180, SC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 39B, 40, 40A
Evidence Act 1950 s 114(g)
Penal Code s 34

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Manoj Kurup (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zaki Chief Justice (delivering judgment of the court):

INTRODUCTION

[1] All the three appellants were jointly charged for drug trafficking under s 39B of the Dangerous Drugs Act 1952 ('the Dangerous Drugs Act') read with s 34 of the Penal Code ie, for acting with a common intention. They now appeal against their convictions which were upheld by the Court of Appeal.

[2] For the purpose of these appeals, Mohd Junaidi bin Hussin will be referred to as the first appellant, Mohd Salleh bin Yunos the second appellant and Ghazalee bin Kasim the third appellant as they were described as the first to the third accused respectively by the High Court.

[3] The amount of drugs involved was 50,659g of cannabis.

[4] It was unfortunate that the trial judge took some four years five months to decide to call for defence. According to the appellants, the delay had prejudiced them. The appellants raised the same issues before the trial judge. This was the main ground of appeal raised by all three appellants.

[5] The other three grounds raised were the failure of the prosecution to produce or offer to the appellants a person known as 'Ah Meng'; the issue of common intention and that because cannabis was also known as 'Indian Hemp', possession thereof does not amount to an offence.

DELAY

[6] According to the appellants delay by the judge had caused miscarriage of justice to them and because of the delay, the appellants were no longer confident to give their defence on oath as they may have forgotten parts of the evidence and also unable to locate witnesses to support their defence.

[7] Delay whether in commencing a case, calling for defence, making the decision at the end of a trial or writing out grounds of judgment, may cause injustice. It is an act which is frowned upon or even detested by everyone including the appellate courts. Trial judges should make their decisions as early as possible and thereafter write their grounds. In fact, in cases involving death penalties, where every conviction will definitely be appealed against by the convicted person right up to the apex court, there is no reason why trial judges should not write their grounds even before delivering their decisions. It is not like other cases where there may not be an appeal. On the other hand, the courts must also view a case from the angle of public interest. It would be against public interest to let off a person when there is no doubt that he has committed the offence even though there had been delay. Delay per se cannot be construed as a miscarriage of justice (see Arifin bin Zakaria CJM in *Amathevelli a/p P Ramasamy v Public Prosecutor* [2009] 2 MLJ 367 at p 374; [2009] 3 CLJ 109 at p 116; Hj Mohd Azmi bin Dato' Hj Kamaruddin SCJ in *Tan Hun Wah v Public Prosecutor and another appeal* [1994] 1 MLJ 382 at p 388; [1994] 2 CLJ 180 at p 184). They depend on the facts of each case.

[8] One of the factors in considering the ability of a good judge is how up to date he is with his grounds of judgments. A judge who finds difficulty in making a decision is not a good judge. A reasonable time must be allowed to enable a judge to weigh the evidence and to check and read up the law. It is also realised that some may take more time than others. A decision made in a rush is also not a good decision lest the judge has not properly considered the factual and legal issues thoroughly. On the other hand, extreme delay can be damaging to all concerned, whether to the prosecution or the defence.

[9] In the case before us, the Court of Appeal had correctly analysed the grounds of judgment of the trial judge and rightly concluded that the delay had not caused injustice.

[10] The Court of Appeal had thoroughly analysed a long list of authorities against the facts of this case before concluding that delay of calling for defence on the facts of this case, had not resulted in injustice to any of the three appellants. The Court of Appeal rightly concluded that the learned trial judge's grounds of judgment supported his finding of a prima facie case. The learned trial judge had thoroughly evaluated the facts adduced by the prosecution before coming to the conclusion that there was prima facie case proven. In other words, he had applied the maximum evaluation of the prosecution's case. We can recite the finding of facts by the learned trial judge here but to do so would in our opinion be pure repetition. What is important is that we have gone through in detail the grounds and are satisfied that the learned trial judge had analysed the facts thoroughly. In fact, the appellant had not indicated at all that the trial judge had failed to do so.

[11] On this ground of appeal, we therefore find that on the facts of this case (and we stress, 'on the facts of this case') the delay by the learned trial judge in calling for the defence had not caused any injustice.

[12] We must however remind all trial judges that this case is not to be taken as precedent for an excuse to take too much time to decide and write their grounds of judgment. For myself, the President of the Court of Appeal, Chief Judge of Malaya as well as the Chief Judge of Sabah and Sarawak, we are closely monitoring that there should not be unnecessary delay by trial judges in commencing a case, calling for defence, making the decision at the end of a trial and writing out grounds of judgment. Steps are also being taken by the judiciary in all areas to speed up dispensation of justice without compromising the quality of justice.

'AH MENG'

[13] The appellants, particularly the third appellant next argued that the failure to call or offer 'Ah Meng' as a witness to the defence is fatal to the prosecution's case.

[14] Briefly, the prosecution's case is that the first and second appellants were arrested with the cannabis found in the boot of the car WFJ 7045 to which the first appellant held the keys. The second appellant was with the first appellant. In the meantime, the third appellant met PW10 at the Lion City Hotel to collect RM70,000 as payment for the cannabis.

[15] Who was Ah Meng? Was Ah Meng an informer or was he an agent provocateur? Does it make any difference whether Ah Meng is an informer or agent provocateur? Has the failure of the prosecution to call Ah Meng or offer

A him as a witness to the defence prejudiced the appellants? On the facts of this case, has it raised any reasonable doubt as to the guilt of the appellants?

[16] The name Ah Meng came about during cross examination of PW5. The defence was that Ah Meng was 'an active participant in the transaction, who brought the drugs from Kuala Lumpur to Johor Bahru and was present in the Lion City Hotel with PW10, the undercover agent.' This statement by the third appellant was without support and on the facts of this case cannot be reasonably accepted. Lion City Hotel was the place where the exchange of cash was to take place. These allegations by the appellants were however denied by the prosecution. Subsequently, during the trial, evidence was adduced by the prosecution by recalling ASP Zulkifly bin Ali (PW4) that attempts to locate Ah Meng was unsuccessful. Another reason why the trial judge held that the failure to call Ah Meng as a witness or to offer him as a witness was not fatal to the prosecution's case was that 'there was no evidence other than that of the defence seeking to cast him as an agent provocateur that Ah Meng was other than an informant.' In other words, according to the third appellant, if Ah Meng had been accepted as an informer, the prosecution is not obliged to produce him (see s 40 of the Dangerous Drugs Act). On the other hand, according to the appellants, if Ah Meng is an agent provocateur, the prosecution would have been obliged to produce him.

[17] Section 40A of the Dangerous Drugs Acts, places an agent provocateur's evidence no less credible than any witness merely by virtue of him being such. The reason according to the third appellant why he wanted Ah Meng was to support his defence that he was, at the Lion City Hotel, to meet Ah Meng to collect a gambling debt. According to the third appellant, Ah Meng had a gambling debt amounting to RM25,000 owing to him. Assuming that this is so, why did he count the money brought by the prosecution witness PW10 amounting to RM70,000 instead of just asking for the RM25,000 allegedly owed to him? There was no indication that he questioned why there was RM70,000 instead of RM25,000.

[18] The appellant asked us to invoke s 114(g) of the Evidence Act 1950 ('the Evidence Act') and to hold that failure to produce Ah Meng as witness is fatal to the prosecution's case. On the facts of this case we do not think we should invoke s 114(g) of the Evidence Act.

[19] The court will only invoke s 114(g) of the Evidence Act for failure to call a witness if it is of the opinion that the prosecution does so to withhold or suppress evidence which, if produced could be construed against the prosecution or otherwise in favour of the accused (see Mohamed Azmi SCJ in *Munusamy Vengadasalam v PP* [1987] 1 CLJ 250; [1987] CLJ Rep 221, Edgar Joseph Jr FCJ in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen &*

Ors [1998] 1 MLJ 465; [1998] 1 CLJ 793 (FC)). The prosecution can also, in the alternative, offer to the defence any witness which they do not wish to call. As to which witness the prosecution chooses to call is entirely up to them. Calling a wrong witness may be detrimental to their case. The same goes if they fail to call a material witness. This is where s 114(g) of the Evidence Act may be invoked by the court.

[20] In *Mohd Shamshir bin Md Rashid v Public Prosecutor* [2008] 5 MLJ 80 at p 107; [2008] 6 CLJ 738 at p 768 the Court of Appeal discussed at length the prosecution's discretion whether to call a witness or not and the implications for not doing so. In this appeal before us, there is no evidence to show that the prosecution had intentionally withheld the production of Ah Meng as witness. In fact, as mentioned earlier, according to the PW4, Ah Meng could not be traced. Anybody in Ah Meng's position would have just lost himself. To be traced and to come to court after leading police to the arrest of the three Appellants is going to expose himself to, possibly, his death. The other way of looking at the issue is, if it is true that the Ah Meng owes the third appellant RM25,000, Ah Meng must have been a big time gambler. If he is so, he must be quite well known for the appellant, at least, to assist the police in tracing Ah Meng. We bear in mind that there is no obligation on the defence to assist the police in any way in their investigation (see Yong Pung How CJ in *Mohamed Abdullah s/o Abdul Razak v Public Prosecutor* [2000] 2 SLR 789 (HC) at p 805) but on the facts of this case, if what the third appellant say is true, then he should be able to give some information to the police as to where Ah Meng could be found.

SECTION 34 OF THE PENAL CODE

[21] The issue as to whether common intention under s 34 of the Penal Code was proven was also raised.

[22] Section 34 of the Penal Code is invoked by the prosecution in order to prove that although an accused did not directly commit the criminal act, he was involved in a series of other acts with the others to show that he had the common intention of committing that criminal act with the others. The accused need not be present together with the others who had committed the actual criminal act (see Gopal Sri Ram JCA in *Sabarudin bin Non & Ors v PP* [2005] 4 MLJ 37 at p 50; [2005] 1 CLJ 466 at p 482 (CA)). It is sufficient that he participated jointly with the others. It must however be shown that there was a prior arranged plan with the others. In other words, all those who are charged pursuant to s 34 of the Penal Code, must have the common intention to commit the offence charged.

A **[23]** On the facts of this case, it was proven beyond any reasonable doubt that the third appellant was in the room to collect the money as payment for the sale of the drugs while the first and second appellants were delivering the drugs. The third appellant in his unsworn statement said he was there to collect RM25,000 gambling debt from Ah Meng. However, as earlier mentioned, it B was not disputed in cross examination that the amount of cash brought by PW10 was RM70,000. According to PW10, the RM70,000 cash was counted by the third appellant himself. This was of course denied by the third appellant in his unsworn statement.

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[24] The offence for which the appellants were charged with was for trafficking in dangerous drugs. Trafficking includes the act of selling. And selling involves transfer of money as consideration for delivery of the drugs. (See the definition of trafficking under s 2 of the Dangerous Drugs Act). There D is only one conclusion to be derived from the facts adduced by the prosecution and that is while the third appellant collected the cash for payment of the sale of the cannabis at Lion City Hotel, the first and second appellants were responsible for delivering it at Merlin Inn Hotel. It is therefore clear that the third appellant had prearranged and acted in concert with the first and second E appellants to traffic in the cannabis. From the grounds of judgment of the trial judge, this was what he concluded.

[25] The trial judge found that the third appellant's statement from the dock that he was at the Lion City Hotel to collect upon a gambling debt from Ah F Meng was only possibly true but did not raise any reasonable doubt and that all the three appellants therefore acted with common intention. We find that there is nothing wrong with this conclusion and agree with his findings.

CANNABIS/INDIAN HEMP

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[26] As was submitted by the respondent, cannabis is known by different names all over the world. The chemical constituents of that item are the same. It is the resin contained in the cannabis (or Indian hemp) that is the deleterious H part of the dangerous drug. As far as the issue of 'Indian hemp' is concerned, we do not think there is any basis to hold that because cannabis can also be called 'Indian Hemp' therefore the drugs seized, which formed the basis of the charge, did not fall within the definition of 'dangerous drugs' under the Dangerous Drugs Act.

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CONCLUSION

[27] On these findings, we dismiss all the three appellants' appeals and affirm and uphold their convictions and sentences.

Appeal dismissed and convictions and sentences affirmed.

Reported by Ashok Kumar